No. 95-831

Supreme Court, U.S.
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Supreme Court of the United States

OCTOBER TERM, 1995

CANAVERAL PORT AUTHORITY,
COASTAL STEVEDORING COMPANY, AND
PORT CANAVERAL STEVEDORING, LTD.,

Petitioners,

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION,
AFL-CIO
AND THE NATIONAL LABOR RELATIONS BOARD,

Respondents.

On Petition For a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONERS' REPLY BRIEF

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9 pp

TABLE OF AUTHORITIES

Cases: **Page**

Dowd v. ILA,
975 F.2d 779 (11th Cir. 1992) 5, 6

ILA (Shipside Packing Co.),
227 NLRB 659 (1976) 6

NLRB v. Town & Country Elec., Inc.,
116 S. Ct. 450 (1995) 5

Pipefitters Local 280 (Aero Plumbing Co.),
184 NLRB 398 (1970) 6

Statutory Provisions:

29 U.S.C. § 152(13) 6

29 U.S.C. § 158(b)(4)(i) 6

29 U.S.C. § 158(b)(4)(ii) 6

Other Authorities:

Nation's Business, Feb. 1996 2

Restatement (Second) of Agency (1958) 6

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PETITIONERS' REPLY BRIEF

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1. The Solicitor General and the International Longshoremen's Association ("ILA") do not challenge

petitioners' statement of the facts and proceedings below, based upon a stipulated record. (NLRB Br. at 2-8; ILA Br. at 3.) This petition, therefore, presents a pure question of law under the National Labor Relations Act ("NLRA" or "Act.")

2. The ILA contends that this case is not of exceptional importance because the decision of the Court of Appeals "could apply only in unusual and discrete situations involving foreign unions." (ILA Br. at 17.) But "situations involving foreign unions" -- under usual and nondiscrete circumstances -- are precisely those in which this case will have its most pronounced impact on domestic and international trade and labor relations. Thus, when newly elected AFL-CIO President John J. Sweeney was recently asked whether "corporate campaigns" by unions can work better than strikes, he responded:

> Corporate campaigns can be used in nonstrike situations, as well as strike situations, especially in a company where the union has relationships with other unions in other parts of the world. That can be a tremendous force where the company is organized around the world. [*Nation's Business*, Feb. 1996 at 19.[1]]

3. The Solicitor General does not attempt to support the reasoning or conclusions of the Court of Appeals. To the contrary, he states that the court "should have accorded

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[1] The D.C. Circuit's decision does not simply insulate foreign disputes in aid of domestic labor disputes from the application of the NLRA's secondary boycott prohibitions. In its brief, the ILA carefully sidesteps the application of this case which would protect domestic unions that operate through domestic intermediaries that are not "labor organizations." (*See* Pet. at 28.)

greater deference to the Board's conclusion" that there was an agency relationship. (NLRB Br. at 9.) The clear import of that statement is that the Board was right and the court was wrong.

This conclusion is further confirmed by the way the Solicitor General states what he believes should be the controlling rule of law: whether the threats made by the Japanese unions were "properly attributable to the ILA." (*Id.* at 8.) If that were indeed the test adopted by the Court of Appeals, we would not be here. The record leaves no doubt whatsoever but that the threats were "attributable" to the ILA -- that was their *only* source. The ILA sought them, welcomed them, and thanked the Japanese for them once they occurred.[2] In the words of the ILA, "the ILA asked for help, the Japanese unions gave it, and when the ILA asked them to stop, the Japanese unions stopped." (ILA Br. at 11.)

As the Solicitor General concedes (NLRB Br. at 6), that was not the test for an agency relationship established by the court below. The court focused on whether the ILA "exercised ... control" over the Japanese (*id.*) and then went beyond *de facto* control (*e.g.*, over when and how threats would be made, to whom, and when they would stop) to require some level of formal relationship, affiliation or contractual "control." American unions can virtually never be said to exercise control over foreign entities under that restrictive test and therefore are free, under such a test, to engage in conduct on foreign soil that, in the words of the Solicitor General, "would clearly have violated Section

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[2] The Court of Appeals recognized that the ILA "expressly solicit[ed]" the aid of "their foreign counterparts" in this case (Pet. App. 22a), and the ILA treated this aid as being undertaken "on our behalf." (Pet. App. 73a.)

8(b)(4)(ii)(B) had it been engaged in by an American union in the United States." (*Id.* at 8.)

The Solicitor General does not say that the issues in this case are unimportant or not worthy of the Court's attention. Instead, he says that the facts here are "unusual," the Court of Appeals did not reach the jurisdictional question, and if the opinion below has far-reaching implications, the Court can address them in future cases. (*Id.* at 9-10.)

The facts in this case are unusual only in terms of the blatant and open way in which the ILA sought help abroad; this kind of behavior normally is engaged in with more circumspection. The brazen fashion in which the illegal conduct took place is a reason for taking the case, not leaving it alone, because, as noted above, the undisputed facts revealed by the record present a pure legal question.

That the Court of Appeals did not reach the jurisdictional question is also no reason not to review the case. If this Court holds that the Court of Appeals used the wrong test of agency under the controlling statute, the jurisdictional issue can be faced in due course.

Finally, the Solicitor General is simply wrong in his reliance on "future cases." (NLRB Br. at 9.) Under the Court of Appeals' ruling, unions will now be free to engage in this extraterritorial coercive conduct. The NLRB has not challenged the decision of the Court of Appeals. As a result, there may well be no future cases, because the NLRB's General Counsel will never file a complaint. The violations will continue. This case thus represents a last clear chance to stop this illegal conduct in its tracks.

4. The ILA concedes that the D.C. Circuit took a completely different "jurisprudential approach" to the role of the NLRB in the development of national labor policy under

the Act's secondary boycott proscriptions than did the Board itself or the Eleventh Circuit in *Dowd v. ILA*, 975 F.2d 779 (11th Cir. 1992) (Pet. App. 50a-72a); (ILA Br. at 4-5.)

This Term, the Court has reiterated and emphasized the critical role of the NLRB in fashioning national labor policy. The Court said that its "decisions recognize that the Board often possesses a degree of legal leeway when it interprets its governing statute, particularly where Congress likely intended an understanding of labor relations to guide the Act's application." *NLRB v. Town & Country Elec., Inc.*, 116 S. Ct. 450, 453 (1995). That is why the Board's views are entitled to "the greatest deference." *Id.* Substituting its judgment for the judgment of the Board, the D.C. Circuit here fashioned its own national labor policy.

5. The Solicitor General points out that the Eleventh Circuit in *Dowd* was using a different standard of review than the D.C. Circuit used (NLRB Br. at 9), and the ILA criticizes and dismisses the Eleventh Circuit's analysis in *Dowd* as dictum. (ILA Br. at 8.) Yet, in rejecting the NLRB's interpretation of "agency," the D.C. Circuit itself acknowledged that the holdings in these two cases cannot be reconciled. (Pet. App. 22a.)[3]

6. The ILA contends that it cannot be held responsible for the threats of the Japanese unions because it had no capacity or power itself to direct the members of the Japanese unions, and an agent can do only "what the principal himself could do." (ILA Br. at 11-13.) The

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[3] The two standards of review are not as divergent as they may first appear. The standard of review in *Dowd* was whether the NLRB General Counsel's legal theory of liability -- and agency -- was "substantial and not frivolous." (975 F.2d at 784; Pet. App. 55a.) The D.C. Circuit stated that the NLRB's interpretation of agency was "wholly unreasonable." (Pet App. 16a n.5.)

Eleventh Circuit in *Dowd* expressly rejected this contention. (975 F.2d at 785; Pet. App. 59a-60a.) The ILA had the power to threaten neutrals, although these threats were unquestionably more effective coming from the Japanese. As the Eleventh Circuit stated, "[w]e decline to reject the Board's theory of agency simply because ILA selected a messenger more capable than itself." (975 F.2d at 785; Pet. App. 60a.) Moreover, as that court also noted, a principal need not always "be able to perform personally the task for which he or she retains an agent." (*Id.*; Pet. App. 60a.) Stated another way, "[t]he master may be liable although the actor is not liable." *Restatement (Second) of Agency* § 212 cmt. c (1958). The ILA also ignores fundamental common-law principles of "ratification" under which a principal may be bound by conduct taken by a third party who was *not* an agent, did not have any actual authority to act, and was not under any right of control. *See id.* at §§ 82, 83 & cmt. b, 85(1), 94.

7. Finally, the ILA gives short shrift to the statutory language itself that governs this case. A determination of an "agency" relationship under Section 2(13) of the NLRA, by its express terms, depends upon whether one person makes another person "responsible for his acts."[4] As the Solicitor General notes in his brief, the Board focused on this question and concluded that the ILA had authorized and ratified the

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[4] The ILA is at its most disingenuous in suggesting that the two cases relied upon by the NLRB, *Pipefitters Local* 280 (*Aero Plumbing Co.*), 184 NLRB 398 (1970), and *ILA (Shipside Packing Co.)*, 227 NLRB 659 (1976), were not "agency" cases. (ILA Br. at 13-14.) In addition, the ILA's purported distinction between Sections 8(b)(4)(i) and (ii) (ILA Br. at 17-18) was rejected by the Eleventh Circuit, rejected by the Board, and accepted for the first time by *any* court in the D.C. Circuit.

conduct of the Japanese unions. (NLRB Br. at 5-6, 8.) The D.C. Circuit, however, imposed its own right-of-control test that is, among other things, bereft of NLRA precedent, directly contrary to the conclusions of the Eleventh Circuit, at odds with the liberal application of agency principles and deference to the NLRB, and oblivious to the common-law precept that ratification may exist without control.[5] The Court of Appeals has issued an unsound decision of widespread significance that merits this Court's review.

For each of the reasons above and in the Petition, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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[5] In its brief in opposition, even the ILA has backed away from the D.C. Circuit's discussion of right-of-control by agreeing that one independent union "may be the agent of another for purposes of secondary boycott liability, —in the right circumstances ...." (ILA Br. at 18.) The ILA may agree, but the D.C. Circuit does not.